JUDGMENT NO. 236 YEAR 2016

In this case, the Court considered a referral order questioning the constitutionality of a provision of the Criminal Code that imposed a sentence of between five and fifteen years imprisonment for the crime of alteration of an infant's civil status on a birth certificate through false certifications, false statements, or other falsehoods. While the Court rejected the referring judge's argument that the severity of the punishment revealed that the provision had become outdated as a grounds for unconstitutionality, it struck down the provision, holding it unconstitutional on other grounds. The Court observed that criminal punishments fall within legislative discretion, and that its role is limited to interventions where legislative choices have been blatantly arbitrary or radically lacking in justification, so as to amount to a distorted use of that discretion. Here, the Court held that the disproportionate punishment in relation to the crime was manifestly unreasonable. Even in such cases, the Court observed that it must draw solutions from indications traceable to the legislative context, and may not superimpose its own will upon that of the elected representatives. Therefore, in this case, the Court compared the crime and punishment described in the challenged provision with that found in an earlier section of the same provision. Finding that the crime in that earlier section was very similar to the one in the challenged provision, but the sentence connected with it was between three and ten years, rather than between five and fifteen, the Court found that there was no justification for the longer sentence in the challenged provision, and mandated that it should be adjusted to between three and ten years. This, the Court observed, also allowed judges to adjust the sentence to suit the circumstances of well-intended, but nevertheless guilty, parties, whose engagement with the constitutionally-mandated rehabilitative aim of the punishment process would be compromised by the sense of injustice fostered by the imposition of too heavy a sentence.

[omitted]

THE CONSTITUTIONAL COURT

[omitted]

gives the following

JUDGMENT

in proceedings concerning the constitutionality of Article 567(2) of the Criminal Code initiated by the Ordinary Tribunal of Varese, during the criminal trial of P.S. et al, with a referral order of 30 September 2015, registered as no. 13 of the 2016 Register of Referral Orders and published in the Official Journal of the Republic, first special series of 2016.

Considering the entry of appearance of the President of the Council of Ministers;

having heard from Judge Rapporteur Nicolò Zanon in chambers on 21 September 2016.

[omitted]

Conclusions on points of law

1.– The Ordinary Tribunal of Varese has raised questions concerning the constitutionality of Article 567(2) of the Criminal Code, in the part in which it allegedly provides, with respect to the crime addressed therein, an unreasonably excessive and disproportionate punishment, including in comparison with the other criminal offenses contained in Book II, Title XI, Point III of the Criminal Code, thus violating the principle of reasonableness enshrined in Article 3 of the Constitution as well as the principles of guilt and of the necessary rehabilitative purpose of punishments found in Article 27 of the Constitution.

The challenged provision, which falls under the heading "Alteration to status," provides, in section two, that whoever, in the course of the formation of a birth certificate, alters the civil status of an infant through false certifications, false statements, or other falsehoods, shall be sentenced to between five and fifteen years in prison. The referring judge alleges that such a

sentencing range is unconstitutional on the grounds that it is excessive and, therefore, unreasonable and disproportionate, in violation of Article 3 of the Constitution, in light of the effective negative social value that may currently be attributed to the criminalized conduct, including in relation to the kind of punishments that the legislator has established for the criminal offenses found in Articles 567(1), 566(2), and 568 of the Criminal Code, which, the referring judge alleges, are offenses analogous to that established in the challenged provision and are allegedly no less serious (or even more serious) than it.

The referring judge also alleges that the provision violates Article 27 of the Constitution, arguing that the provision of such a severe penalty, particularly in its minimum sentence, prevents the judge from handing down sanctions that are proportionate to the actual negative social value of the conduct, thus violating the principle that criminal liability must be personal as well as the principle that punishments must have rehabilitative ends.

In the reasoning section of the referral order, but not in the operative part, reference is also made to Article 8 of the European Convention on Human Rights (hereinafter ECHR), signed in Rome on 4 November 1950, ratified and executed with Law no. 848 of 4 August 1955, based on the argument that providing an unreasonably severe sentence conflicts with the correct proportionality that should exist between the level and intensity of the interference of public authorities in the private life and family relationships of individuals – an interference consisting of the criminal provision in question – and the legitimate goal of protecting the truth of the civil status of infants, which is what the provision aims to do. Specifically, such a disproportion allegedly prevents judges from determining a punishment that is reasonably correlated with the seriousness of the conduct and the reasons that motivated the accused to act in violation of the law.

2.– The objection of partial inadmissibility brought by the State Counsel's Office [*Avvocatura generale dello Stato*], which refers to this latter ground for unconstitutionality, would stand if the referring judge had intended to effectively claim that there is a direct contrast between the challenged provision and Article 8 of the ECHR. Indeed, this Court has consistently held that the provisions of the ECHR do not provide parameters that may be invoked directly to assert the unconstitutionality of domestic laws. Rather, they amount to "interposed rules," the observance of which is required by Article 117(1) of the Constitution (see, among many, Orders no. 21 of 2014, 286 of 2012, 180 of 2011, and 163 of 2010). The referring judge never even mentioned said parameter, in either the reasoning section or the operative part of the referral order.

For this very reason, moreover, we may conclude that the referring judge's references to the conventional law play a merely supplementary role in the claim of unconstitutionality, reinforcing the aspects of the challenge that relate to the alleged lack of proportionality between the repressive measures provided for by the challenged rule and the need for protection that justifies them (Judgment no. 12 of 2016; order no. 286 of 2012).

3.– The distinctive characteristic of the questions under review lies in the challenge of manifest unreasonableness intrinsic to the sentence provided for the crime found in Article 567(2) of the Criminal Code.

It is, first of all, challenged in light of its alleged comprehensive transformation of the regulatory, technical, and scientific conditions, which, the referral order argues, renders so severe a punishment outdated. Indeed, the referring judge assumes that the negative social value of the conduct described in the challenged provision had been reconfigured with respect to the time period in which the Criminal Code entered into law. The referral order argues specifically that such a severe sentence range is clearly outdated in that birth certificates are no longer the only tool for ascertaining a child's true *status filiationis*, in light of the increased facility of determining biological paternity and maternity provided by technological and scientific advancements, and, in addition, recent reforms in the area of family law, which

allow someone to claim a filial status different from the one indicated on a birth certificate in the event that a infant was registered as the child of unknown parents (among other things), or in conformity with a different presumption of parenthood.
Moreover, the sentencing range allegedly reveals itself as unreasonably severe in that it prohibits a judge, de facto, from taking into account the circumstances that have led the actor in question to present false certifications or statements, in light of a goal of protecting the interests of the infant, who may be fatherless or born to biological parents who do not intend to recognize him or her, and to whom the actor nevertheless intends to grant family ties, albeit in a twisted and incorrect way. This, in addition to obliging the judge to impose punishments that are disproportionate to the real negative social value of the conduct, would aggravate, in the convicted person, the perception of being subjected to an unjust sentence, unconnected with the seriousness of his or her conduct, in blatant contradiction with the principle that the ends of a punishment must be rehabilitative.
Finally, the referring judge points out that other criminal offenses involving the alteration of status, committed through substitution of an infant, found in the first section of Article 567 of the Criminal Code, are punished with allegedly "decidedly inferior" sentences, notwithstanding the fact that they relate to conduct which he considers to be "more serious and alarming," since they involve, in his view, a greater determination to act on the part of the convicted person, a more marked awareness of the intrinsic illegality of the conduct, and a more pronounced propensity to break the law.
4.– The questions are well-founded, in light of both of the constitutional parameters invoked by the referral order.
4.1.– Not all the arguments used by the referring judge to support the admissibility of the questions raised are on point. This is the case with, in particular, the arguments relating to the alleged datedness supposedly revealed by the severity of the punishment.
The transformations of the regulatory, technical, and scientific context, which the referring judge points to as evidence of a comprehensive transformation of the context, in and of themselves do not have the capacity to lighten, in the public perception, the gravity of the criminalized conduct and its resulting social alarm. The State Counsel's Office is not wrong when it points out that the increased facility of ascertaining biological paternity and maternity, offered by technological and scientific advancements and the possibility of accessing DNA testing, is not capable of diminishing the negative social value of the conduct punished by the challenged provision, for the simple reason that the victim of such a crime of alteration of status may never develop doubts about his or her biological origins, which alone would induce that person to actually resort to a genetic investigation.
Similarly, for the case under review, the recent family law reforms do not have a direct bearing. It is true that this Court has, in the past, censured legislative regulations for subsequently arising unreasonableness, to the extent that they were examined as part of a regulatory framework that had changed with respect to the one that was in force at the time of their issuance (Judgments no. 354 of 2002 and 440 of 1994). But in those cases, the changes in question, although only indirectly related, closely involved the challenged provision by disrupting its very justification. In the referring judge's view, on the other hand, this Court should give weight to reforms that have taken place in the entirely different sector of civil law, especially to the extent that they tend to enhance the value, for purposes of proving filiation, so-called "technological proof," that is, the aforementioned methods for establishing the genetic makeup of the persons concerned. Nevertheless, even from this perspective, no bearing on the negative social value of the conduct the punishment of which is prescribed by Article 567(2) of the Criminal Code may be ascribed to these methods.

4.2.– The challenges prove to be well-founded in virtue of the manifest disproportion of the challenged sentencing range, if considered in light of the actual negative social value of the criminalized conduct.

Constitutional case law has consistently held that Article 3 of the Constitution requires that a punishment be proportionate to the negative social value of the illegal act committed, such that the penal system works simultaneously to fulfill both the function of social defense and that of protecting individuals. Protection of the principle of proportionality, in the area of criminal law, leads to "deny the legitimacy of incriminations which, even if presumably suitable for attaining statutory preventative ends, produce, by means of the punishment, damage to the individual (to his or her fundamental rights) and to society that are disproportionately greater than the advantages obtained (or to be obtained) from this latter with the protection of the goods or values compromised by the aforementioned crimes" (Judgments no. 341 of 1994 and 409 of 1989). Here it bears mentioning Article 49(3) of the Charter of Fundamental Rights of the European Union – done at Nice on 7 December 2000, and which has now obtained the same legal value as a treaty, by virtue of Article 6(1) of the Treaty on European Union (TEU), as modified by the Lisbon Treaty, signed on 13 December 2007, ratified and executed with Law no. 130 of 2 August 2008, and entered into force on 1 December 2009 – according to which "the severity of penalties must not be disproportionate to the criminal offense."

In this delicate area of the legal system, the principle of proportionality demands a legal articulation of the system of punishments that makes it possible to adjust a punishment to suit the effective personal responsibility in question, thus carrying out a justice-related function as well as one of protecting the individual positions and acting as a limit on the state's punitive power, in harmony with the "constitutional dimension" of the criminal system (Judgment no. 50 of 1980).

In addition to this, Article 27 of the Constitution contributes the principle of the rehabilitative purpose of punishment, which constitutes "one of the essential and general qualities that characterize punishment in its ontological contents, and accompany it from its origin, in the abstract normative provision, until the moment it is extinguished in the concrete instance" (Judgment no. 313 of 1990; see also Judgments no. 183 of 2011 and 129 of 2008). Therefore, this principle does not apply only during the execution of the sentence, but is also binding upon both the legislator and the judges with jurisdiction over the question (Judgment no. 313 of 1990). The rehabilitative purpose of punishment, too, in illuminating the abstract regulatory provision, requires "a constant principle of proportion between the quality and the quantity of the punishment, on the one hand, and the offense, on the other" (Judgment no. 251 of 2012 and, again, 341 of 1994), while the clear disproportion of the sacrifice of personal freedom produces "a frustration of the rehabilitative aim of punishment prescribed by Article 27, third paragraph, of the Constitution, which constitutes an institutional guarantee of said freedom in relation to the state of detention" (Judgment no. 343 of 1993).

Where the proportion between the punishment and the offense is manifestly lacking, because the legislator has attached punitive consequences that are disproportionate to the level of offensiveness inherent in the conduct described in the crime, an *ab initio* compromise of the rehabilitative process necessarily results, since the convicted individual will tend not to adhere to the process for the mere perception that he or she is being subjected to a profoundly unjust sentence (Judgments no. 251 and 68 of 2012), which is totally detached from the seriousness of his or her conduct and the negative social value it expressed.

In this context, the particular harshness of the punishment therefore effects a violation of both Articles 3 and 27 of the Constitution, since both the principle of proportionality of the punishment with respect to the seriousness of the act committed, as well as the rehabilitative

purpose of the punishment are compromised (Judgment no. 68 of 2012, which cites Judgments no. 341 of 1994 and 343 of 1993).
This is what happens in the case of the sentencing range provided for the crime found in Article 567(2) of the Criminal Code.
It bears remembering that, in its decision on the additional punishment of the loss of parental power (today called parental "responsibility"), which occurs as an automatic consequence of a conviction for the crime of alteration of status, this Court has already underscored that the crime described in Article 567(2) of the Criminal Code, "unlike other criminal hypotheses that harm minors, does not in and of itself contain an absolute presumption of prejudice to their moral and material interests" (Judgment no. 31 of 2012), therefore recognizing that the convicted person, albeit in the commission of a crime, may potentially have been acting for purposes not detrimental to, but rather in favor of the infant's interests.
In light of such a possibility, the disproportionate nature of the sanction is clear: even by adopting the minimum allowable sentence, a judge would in any case be forced to inflict excessive punishments, which do not bear a reasonable relationship to the negative social value of the conduct.
In the referral order, the concrete details of the case in the pending proceedings are not laid out in detail, except in the form of mere references sufficient to assert the relevance of the questions of constitutionality raised. The referring judge only adds that, even applying the attenuating circumstance provided for by Article 62(1)(1) of the Criminal Code (which allows for the mitigation of a punishment in the case of a convicted person who acted "for reasons of particular moral or social value"), the accused could not benefit from the conditional suspension of the punishment.
Nevertheless, for purposes of constitutional review, it is not necessary to ascertain if actions carried out with the supposed purpose of acting in the best interest of the minor child, in particular in order to grant him or her otherwise lacking family bonds, have been actually judged in the pending proceedings. It suffices to consider that the challenged provision, because of how the sentencing range is legally defined, obliges the judge to inflict an unreasonably disproportionate, excessive punishment, including in the circumstances in which the actor's objective – albeit pursued incorrectly through the commission of a falsehood – has in actuality been that of attributing a family bond to a infant who would otherwise have none.
The referring judge is, therefore, not wrong in maintaining that the application of the punishment, even in its minimum allowable form, established by the challenged provision is manifestly unreasonable as excessive, in violation of Article 3 of the Constitution, and, moreover, goes against the principle of the rehabilitative purpose of punishment, since it engenders in the convicted person the belief that he or she is the victim of an unjust imposition, a feeling that inhibits the start of any effective rehabilitative process, violating Article 27 of the Constitution.
4.3– The referral order also calls into question the reasonableness of the sentencing range established by the Criminal Code for the crime of alteration of status through falsehood in comparison with the different, milder punishment prescribed by the legislator for the other crimes contained in Book II, Title XI, Heading III of the Criminal Code, which the same referring judge does not hesitate to call no less serious (or even more serious) than the offense found in the challenged provision.
A non-secondary role – both in the estimation of the referring judge and, as will be explained below, in that of this Court – is played by the specific reference to the milder punishment established for the crime of alteration of status through the substitution of a infant, which is, significantly, found in the first section of the same Article 567 of the Criminal Code, which

situates within the same rubric two provisions united by their common purpose of protecting the same legal good, as this Court recognized in Order no. 106 of 2007.
The questions under review require, first of all, a test of proportionality to scrutinize the sentencing range established by the challenged provision, in light of the constitutional principles invoked (Articles 3 and 27), and not a verification of the alleged diversity of punitive treatment of similar or identical conduct, alleged through the mere identification of provisions which are able to act as a comparator. Rather, in the referring judge's view, the negative outcome of such a test, in terms of manifest unreasonableness on account of a disproportion between the sentencing range, on the one hand, and the negative social value of the conduct, on the other, is revealed "among other ways" in light of the milder punishments put in place for other crimes, including, in particular, the one found in the first section of the same Article 567 of the Criminal Code.
This Court has already refused to declare a violation of only Article 3 of the Constitution on the basis of the supposed difference in the punishments prescribed by the two sections of Article 567 of the Criminal Code (Order no. 106 of 2007). Despite recognizing that both rules intend to protect the same legal good, that is, the interest of the minor child in the truth of the official statement of his or her ancestry, the Court held that the difference in treatment was not illegitimate, since the conduct described in the two sections differs.
As explained above, the different outcome of the questions currently under review results from the fact that the referring judge requested a constitutional review based on the manifest unreasonableness inherent in the punishment prescribed by the challenged provision, on the grounds of proportionality between the severity of the sentencing range and the negative social value of the conduct, with an additional reference to the frustration of the rehabilitative aim of punishment effected by the excessive nature of the punishment, in violation of Article 27 of the Constitution.
4.4.– It does not fall to this Court to make discretional, dosimetric evaluations of criminal punishments, since these are part of the typical role of political representatives, called upon by the reservation of powers enshrined in Article 25 of the Constitution to establish the level of the legal order's reaction to an affront to a given legal good. It bears reiterating the well-established constitutional case law which protects the discretion of the legislator in this area of the law, except for constitutional scrutiny of choices that are blatantly arbitrary or radically lacking in justification, so as to amount to a distorted use of said discretion (see, among many, Judgments no. 148 and 23 of 2016, 81 of 2014, 394 of 2006, and Orders no. 249 and 71 of 2007, and 169 and 45 of 2006).
Nevertheless, at the same time, where signs of manifest unreasonableness emerge on account of the disproportionateness of a punishment, and the intervention of the Constitutional Court is sought, for purposes of instituting justice, by referring judges, this is possible, with reference to set conditions.
In order to avoid superimposing the Court's discretion over that of the representative Parliament, resulting in the exercise of an unacceptable power of choice (see Judgment no. 22 of 2007) in the area of criminal punishment, the evaluation of this Court must be carried out through precise points of reference, already traceable in the legislative system. Even in a judgment of the "inherent reasonableness" of a criminal sanction, based upon the principle of proportionality, it is crucial to identify existing solutions that are suitable to eliminate or mitigate the alleged manifest unreasonableness (Judgment no. 23 of 2016).
Only an evaluation carried out according to these methods remains faithful to what constitutional case law has consistently held, on the basis of which, when it comes to criminal punishments, it is permissible to amend legislative choices "with reference to criteria already traceable within the legal order" (Judgments no. 148 of 2016 and 22 of 2007): given that the purpose of reviewing the relative manifest unreasonableness of choices concerning sanctions

is not to alter the discretional choices of the legislator, but rather to render coherent its previously articulated choices intended to protect a certain legal good, duly proceeding, where possible, to eliminate unjustifiable incongruences.
4.5.– In light of these strict coordinates, in the case at bar, the review of the manifestly unreasonable disproportion between the quality and the quantity of the punishment, on the one hand, and the seriousness of the offense, on the other, is possible through a relational evaluation, which is also requested by the referring judge, carried out entirely within the framework of the same Article 567 of the Criminal Code.
Such scrutiny must be carried out within the closed perimeter of that article, which, for this reason among others, does not lead to the imposition, from the outside, of a heterogeneous dosimetry of punishments with respect to legislative choices, but judges "according to internal lines" the coherence and the proportionality of the sanctions that the legislator has attributed respectively to each of the two criminal offenses that make up the crime of alteration of status.
Given this, the manifest unreasonableness, based on disproportionality, of the challenged minimum and maximum sentencing becomes clear in light of the less severe range (from three to ten years of imprisonment) that the same Article 567 of the Criminal Code provides, in the first section, for the other crime of alteration of the family status of an infant, committed by means of its substitution.
The crimes that are punished, respectively, in the first and second sections of the article are not identical, but neither can they be considered entirely unalike, if for no other reason than that they are both intended to protect, as this Court has recognized previously (Order no. 106 of 2007), the same legal good.
Indeed, the crime found in Article 567(2) of the Criminal Code punishes the modification of the truth not in and of itself, but to the extent that it leads to the loss of the infant's authentic *status filiationis*, highlighting that the criminal provision first of all protects the truthfulness of the filiation status or, more precisely, the interest of the minor child in seeing that a family relationship is recognized that corresponds to his or her actual ancestry.
But the same can be said of the criminal offense described in the first section, where, in the same way, the protection of the minor child's fundamental right to the correct representation of his or her ancestry is privileged, as a precondition of his or her overall quality of life, and, on the other hand, the criminalized conduct, which the referring judge considers, not implausibly, to be no less (if not more) serious, involves not only one, but two infants.
The two crimes, the regulation of which the legislator has decided to enclose within a single article, denoted by the same *nomen juris*, therefore, present common traits which are not irrelevant. Although they are independent from one another, they describe one and the same criminal event, consisting in the alteration of the civil status of a infant, while what varies is the mode of execution, since in the case of one the alternation occurs "through the substitution of the infant," while in the case of the other it occurs "through false certifications, false statements, or other falsehoods" on the infant's birth certificate. But the criminal event is identical, and as a result, for the reasons already described, the legal good protected by the laws against the two criminal offenses is likewise identical.
Ultimately, in the case of both offenses, it is the same good that is compromised, albeit in different forms. But the different modes of execution do not express, in and of themselves, connotations of a negative social value such as to legitimize a difference in punishment. On the contrary, this divergence, which results in a sentencing range that is significantly harsher in the second section, appears to be manifestly unreasonable.
5.– In view of the above, and in light of the limits on this Court's powers of intervention, the only practicable solution consists in equalizing the punishments of the two offenses described

in the single Article 567 of the Criminal Code, as a matter of using, in a consistent way, "criteria already traceable within the legal order."

Therefore, Article 567(2) of the Criminal Code must be declared unconstitutional in the part in which it punishes the crime described therein with a sentence of between five and fifteen years in prison, rather than a sentence of between three and ten years.

This solution gives the judge the possibility to effectively adapt the sentence to the circumstances of the concrete case, with appreciable results for the living system, also calibrating it to the rehabilitative aims which it is intended to serve. Making reverence to the new minimum sentence of three years imprisonment, indeed, the judge may validate circumstances which tend to show a propensity for protecting the infant on the part of the accused; and, on the other hand, a sentence range that allows for a maximum penalty of ten years in prison gives the judge an ample ability to take into consideration circumstances or actions that merit a harsher punishment.

This Court's decision allows for the elimination of the manifest unreasonableness asserted. Opportune intervention by the legislator, to thoroughly and comprehensively reconsider the area of crimes under review, may introduce those different punishments that it may deem appropriate.

ON THESE GROUNDS

THE CONSTITUTIONAL COURT

declares Article 567(2) of the Criminal Code, in the part in which it provides for a sentence of imprisonment for between a minimum of five and a maximum of fifteen years, instead of the sentence of imprisonment for between a minimum of three and a maximum of ten years.

Decided in Rome, at the seat of the Constitutional Court, Palazzo della Consulta, on 21 September 2016.